

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1080

Docket No. 75-1079
Docket No. 75-1105
Docket No. T-4526
Docket No. 75-1120
Docket No. 75-1111

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN THE MATTER OF:

JOSEPH BUSCAGLIA, A Grand Jury Witness, Docket No. 75-1079
LAWRENCE PANARO, A Grand Jury Witness, Docket No. 75-1105
GASPER BONA, A Grand Jury Witness, Docket No. T-4526
FRANK MAMBRINO, A Grand Jury Witness, Docket No. 75-1120
ROBERT OLIVER, A Grand Jury Witness, Docket No. 75-1111

On Appeal from the United States District
Court for the Western District of New York

BRIEF OF GRAND JURY WITNESSES-APPELLANTS

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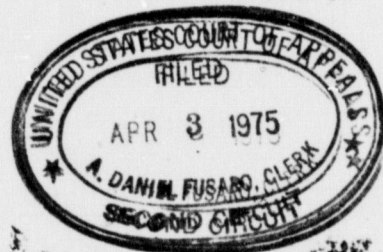


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PRELIMINARY STATEMENT

Five Grand Jury witnesses appeal from Orders of the Hon. John T. Curtin, United States District Court Judge for the Western District of New York, entered March 7, 1975, in the cases of Appellants Buscaglia and Bona, March 17, 1975, in the cases of Appellants Mambrino and Panaro, and March 19, 1975, in the case of Appellant Oliver, remanding them to the custody of the United States Marshall, pursuant to the "recalcitrant witness" statute, 18 U.S.C. §1826, for their refusal to answer certain questions put to them by a Department of Justice Attorney before the Grand Jury, after Judge Curtin had granted them immunity pursuant to 18 U.S.C. §6002 and §6003.

In refusing to answer the questions put to them before the Grand Jury, the Appellants invoked their rights under, inter alia, the First and Fourth Amendments to the Constitution. In particular, the Appellants asserted, and at the hearing on the contempt charges presented evidence, that their being compelled to answer the questions put to them would violate their rights to freedom of speech and to associational privacy under the First Amendment and that the calling of Appellants before the Grand Jury had already infringed on those rights, in that the private social clubs, duly chartered Not-for-Profit Corporations, to which they belong (and of one of which Appellant Joseph Buscaglia was Secretary-Treasurer) had ceased operating

due to the Grand Jury subpoenas of these witnesses and the questions being asked of them.

The Appellants also made claims, pursuant to 18 U.S.C. §3504, that the questions they were asked were the result of unlawful electronic surveillance. The Government responded by affidavits, denying that Appellants' residence telephones had been tapped. However, these affidavits did not deny that the social clubs in question had been subjected to electronic surveillance, but only alleged in a conclusory fashion that each Appellant had not been identified as one overheard by any form of electronic surveillance.

On March 4, 1975, the Court and Government counsel had an in camera conference, the transcript of which was sealed until March 14, 1975, after the Orders herein appealed from in the cases of Buscaglia and Bona were entered. At that conference, Government counsel made a statement, not under oath and without stating what files had been search, that "there is not and there have been no wire taps".

QUESTIONS PRESENTED

(1) Whether the Government's response to Appellants' claims of unlawful electronic surveillance was sufficient, under 18 U.S.C. §3504, for the protection of Appellants' rights not to be compelled to answer questions derived from such unlawful electronic surveillance?

(2) Whether, in light of the evidence that Appellants' rights of freedom of speech and associational privacy were

infringed in the Grand Jury proceeding, Appellants could validly be held in civil contempt pursuant to 18 U.S.C. §1826.

STATUTES INVOLVED

18 U.S.C. §3504.

(a) In any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency regulatory body, or other authority of the United States--

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;.....

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

18 U.S.C. §2510.

(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than--

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal

18 U.S.C. §2515.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

STATEMENT OF FACTS

The five appellants herein were served with subpoenas requiring them to appear as witnesses before a Federal Grand Jury empaneled in Buffalo, New York. This Grand Jury was, according to Government applications for immunity for these witnesses, investigating possible violations of Sections 1955, 892-94, and 1962 of Title 18 United States Code. In later affidavits submitted by the Government in each of these cases, in Paragraph 2 thereof (identical in the case of each of these appellants, see App., Items 14 through 18) the Government referred to "the investigation of the activities occurring at Nairy's Social Club and the Connecticut Social Club in Buffalo, New York".

Appellant Buscaglia appeared before the Grand Jury on February 20, 1975, when he was without counsel, and then refused to testify, invoking, inter alia, his privilege against self-incrimination. On February 20, 1975, the Government applied to Judge Curtin for an order granting Buscaglia immunity under 18 U.S.C. Section 6002 and 6003 and an order requiring him to testify. Counsel was appointed for Buscaglia on February 21, 1975, and the

Government motion was heard and granted February 25, 1975. Buscaglia again refused to testify and the Government moved to have him held in civil contempt pursuant to 18 U.S.C. § 1826. This motion was heard March 4, 1975, and the Court, ruling that no pertinent questions had been asked of Buscaglia, refused to order him held in contempt. The Court did not at that time need to reach the defense of unlawful electronic surveillance raised by affidavit of counsel filed February 28, 1975

Following the above ruling, the Court and Government counsel had an in camera conference, in which Government Counsel stated, not under oath and without stating what files had been search, if any, "There is not and there have been no wiretaps". (App. Item 19) (The transcript of this in camera conference was sealed until March 14, 1975.)

Also on March 4, 1975, Buscaglia was ordered back before Grand Jury, where he again refused to answer. (App., Item 6) In refusing to answer on this and the prior occasions, Buscaglia invoked his rights, inter alia, to the First and Fourth Amendments to the United States Constitution.

The Government orally amended its application for a contempt citation, and annexed the transcript of the March 4, 1975, proceeding before the Grand Jury (App., Item 6), and the application was heard March 7, 1975. In addition to the Grand Jury transcript, before the Court at that hearing were four affidavits. (App. Items 7, 8, 9 , and 14). The first two of these, by counsel, claimed that the Gettysburg Social Club, also known as the

Connecticut Social Club, at 374 Connecticut Street, Buffalo, New York, of which Appellant Buscaglia is a member and Secretary-Treasurer, had been subjected to unlawful electronic surveillance. The third was an affidavit by James W. Gresens, Department of Justice Attorney, which denied that Buscaglia's residence had been subject to unlawful electronic surveillance, but stated, as to the Social Club only that "the Federal Bureau of Investigation...had not overheard Joseph Buscaglia on any form of electronic surveillance". The fourth affidavit (App., Item 14 , by Appellant Buscaglia, included the following paragraphs:

3. Until the Grand Jury investigation and the subpoenaing of many of our club members, the social club was a thriving organization with members constantly about, exchanging ideas, associating with one another and having conversations concerning politics, the affairs of the day, and other matters.

4. Since the Grand jury investigation began in this case and many of our members were subpoenaed, the club has been totally shut down as not one person dares to enter the club to associate with any of the members.

5. Thus, the free exercise of the first amendments freedom of association has thoroughly chilled and brought to a grinding halt by the activity of the Government's Grand Jury Investigation.

Annexed to this Affidavit was a copy of the Certificate of Incorporation of the club under the Not-for-Profit Corporation Law of the State of New York, which included the following as a part of its statement of purpose:

To promote fellowship and extend acquaintanceship by means of social gatherings and lectures;

to promote social intercourse among the members by means of dances, dinners, musicals, and other forms of entertainment; to engage generally in any causes or objects similar to the above mentioned in order to promote the cultural, social, literary and mental welfare of the members; and to promote brotherhood and sociability among its members, to hold and conduct social meetings, excursions and entertainments for its members, to promote the welfare of its members morally, educationally and fraternally.

Counsel for the Government did not dispute the truth of Buscaglia's affidavit. Following argument, Judge Curtin remanded the Appellant Buscaglia to the custody of the United States Marshall, pursuant to 18 U.S.C. §1826.

The cases of the Appellants Panaro, Bona, Mambrino and Oliver are essentially similar, and counsel for all Appellants joined in each others' motions and arguments.

Appellant Panaro was originally called before the Grand Jury on February 20, 1975, where he refused to answer questions, invoking his rights under the First, Fourth and Fifth Amendments. After appointment of counsel on February 25, 1975, he was granted immunity under 18 U.S.C. §6002-03 and ordered to testify. On March 5, 1975, he again refused (App. Item 10), and the hearing was held March 10, 1975, on a motion to hold him in contempt. The Court agreed that the arguments and records of other Appellants and Appellant's counsel would be considered in Panaro's case. After an adjournment, the Court heard argument on March 17, 1975, and ordered Panaro remanded to the custody of the United States Marshall pursuant to 18 U.S.C. §1826.

Appellant Bona was originally ordered before the Grand Jury also on February 20, 1975, when he refused to testify.

After he was granted immunity and ordered to testify, he again refused on March 4, 1975. (App., Item 11). After argument in conjunction with the arguments concerning Appellant Buscaglia, on March 7, 1975, the Court ordered him remanded to the custody of the United States Marshall.

Appellant Mambrino was originally called before the Grand Jury on February 20, 1975, when he refused to testify. After appointment of counsel, on March 6, 1975, he was granted immunity under 18 U.S.C. §6002-03, and was ordered to testify. That same day, he again refused to testify (App., Item 12), and on March 17, 1975, after argument, he was ordered remanded to the custody of the United States Marshall.

Appellant Oliver was also called before the Grand Jury on February 20, 1975, when he refused to testify. After appointment of counsel, on March 6, 1975, he was granted immunity and ordered to testify, and was called back before the Grand Jury that same day, he again refused to testify. On March 19, 1975, after argument, the Court ordered Oliver remanded to the custody of the United States Marshall.

Each of the Appellants invoked his First and Fourth Amendment rights when he refused to testify. Each claimed that unlawful electronic surveillance had been used against him and, in each case, received a flat denial as to the Appellants' residence, but only an equivocal answer to whether he had been overheard at the social club he

belongs to. The Government affidavit, in each case, said only that he had not been "identified" as one overheard, or that he had not been overheard. (App., Items 14 through 18, Paragraph 5 in each affidavit.)

POINT I

APPELLANTS MUST NOT BE HELD IN CONTEMPT WHEN THE ISSUE OF UNLAWFUL ELECTRONIC SURVEILLANCE HAS NOT BEEN RESOLVED BELOW; THE GOVERNMENT'S FAILURE TO DENY THE OCCURRENCE OF SUCH SURVEILLANCE AT APPELLANTS' SOCIAL CLUBS LEAVES OPEN THE POSSIBILITY THAT QUESTIONS ASKED THEM BEFORE THE GRAND JURY WERE DERIVED FROM SUCH SURVEILLANCE.

18 U.S.C. §2515 forbids the use in any Grand Jury proceeding of evidence derived from unlawful electronic surveillance. It is now well settled that a Grand Jury witness may not be held in custody pursuant to 18 U.S.C. §1826(a), when the questions he has refused to answer before the Grand Jury are derived from unlawful electronic surveillance. Gelbard vs. United States, 408 U.S. 41 (1972).

This Court has recently considered such a defense to civil contempt citations. In United States vs. Toscanino, 500 F.2d 267 (2nd Cir. 1974), it was held that a mere assertion that unlawful electronic surveillance has been used against a party triggered the requirements of 18 U.S.C. §3504 that the Government affirm or deny the occurrence of unlawful surveillance against a party, and that this affirmation must be in

affidavit form, indicating which Federal agencies had been checked and extending the denial not only to conversations of Toscanino but also to conversations of anyone else occurring on premises owned, leased or licensed by Toscanino. 500 F.2d 281.

The Court, "in the absence of such sworn written representation", remanded for a hearing on the allegation of unlawful electronic surveillance.

In United States vs. Grusse, No. 75-2029 (2d Cir. Feb. 27, 1975), Slip Opinion 2039, this Court held that an inadvertent insufficiency of the affidavit had been "cured when the Assistant [United States Attorney] testified before Judge Newman". Slip Opinion at 2042 (Lumbard, C.J. concurring) (emphasis added). Grusse apparently does not change the rule that the Government's denial of electronic surveillance must be under oath.

In the cases of these Appellants, the affidavits of the Government in response to Appellant's claims denied, with adequate specificity, that each Appellant's residence had been the subject of electronic surveillance. The affidavits, however, neither affirm nor deny whether any electronic surveillance was conducted concerning the social club which Appellants frequent and in which they are members (and of one of which Appellant Buscaglia is Secretary-Treasurer). This refusal to affirm or deny was made very clear in argument before Judge Curtin March 4, 1975, where the Department of Justice Attorney James Gresens declined to affirm or deny, even orally, whether any such electronic surveillance had taken place.

The denial of telephone taps and the conclusory statement that each Appellant "was not identified" in any electronic surveillance fails to speak to the issues hotly contested at oral argument below: whether oral conversations of Appellants were unlawfully intercepted by a "bug" in the social club, and whether the voices of Appellants were or were not correctly "identified" in the tapes or transcripts of those overheard

conversations. It is not likely that each and every voice heard on such a bug would be identified, and correctly identified, by government investigators, even if the recordings were of X-ray clarity, which is, of course, unlikely with this sort of device. There thus remains the possibility in the circumstances of this case and with the equivocation in the Government's affidavits, that such surveillance was undertaken and that questions asked Appellants were derived from such surveillance. Without a square denial from the Government, Appellants in this Court simply do not know whether those premises were bugged.

Instead of affirming or denying by affidavit, the Government on March 4, 1975, stated to the Court, in camera, "there is not and there has been no wire taps". It is submitted that the in camera response by the Government is defective in two ways.

First, Government Counsel's statement is not sworn. This Court, in Toscanino, supra, and Grusse, supra, has required sworn statements of denial, and the statements of the Department of Justice Attorney Gresens here did not measure up to that standard. Appellants are entitled, under these cases, to more protection against being compelled to answer questions derived from unlawful electronic surveillance, than they have received in the proceedings below.

Secondly, the statement does not indicate the basis of Mr. Gresens' knowledge. As was held in Toscanino, supra, the denial of electronic surveillance may not be merely conclusory, but rather must indicate what Federal agencies have been checked. At the very least, the denial must indicate that the Government

attorney making the denial has checked with the relevant agency and that personnel of that agency have searched the relevant records for any indication of electronic surveillance of Appellant. Toscanino, supra, 500 F.2d at 281; Grusse, supra, Slip Opinion at 2042. See also United States v. Aloï, No. 74-1220 (2nd Cir. January 31, 1975), Slip Opinion 6057.

Nor does Mr. Gresens' in camera denial of the surveillance render the failure to follow the required formalities harmless error. Mr. Gresens is not the only government employee conducting this investigation. It may be presumed that information has passed among the various government personnel conducting this investigation, and to Mr. Gresens, without Mr. Gresens knowing the precise source of each item of information he or others might have used in formulating questions before the Grand Jury. It thus remains possible that Appellants' rights have been violated. Unraveling the source of these various items of information would, of course, require a lengthy and unwieldy hearing. Appellants do not here argue for such a hearing, but rather submit that the sworn, informed denial mandated by Section 3504 and by Toscanino, is precisely designed to avoid the necessity for such a hearing, and is the minimum protection that must be afforded Appellants' rights.

It may be that the Government following an adequate search, can truthfully and fully deny under oath that any electronic surveillance of Appellants took place at their social clubs. But in this record there is simply no such adequate denial, and there remains the possibility that such surveillance had taken place. Appellants and this Court simply do not and

cannot know, on this record. Because this possibility remains, the contempt order should be vacated.

POINT II

APPELLANTS' RIGHTS OF FREE SPEECH AND ASSOCIATIONAL PRIVACY ARE VIOLATED BY THE CONTEMPT CITATION.

It is axiomatic that speech and associational relationships are presumptively protected by the First Amendment, and that the burden rests with the Government which would infringe those rights to show a sufficient justification for its disruptive intervention. See Gooding v. Wilson, 405 U.S. 518 (1972); NAACP v. Alabama, 357 U.S. 449 (1957). In shouldering this burden, the Government must show both that its interests are legitimate and compelling, and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate the Governmental interests subordinating those rights. Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972). In re Stolar, 401 U.S. 23 (1971); Shelton v. Tucker, 364 U.S. 479 (1960). Barenblatt v. United States, 360 U.S. 109 (1958).

In Bursey v. United States, *supra*, two witnesses were held in civil contempt for refusal to answer questions concerning their employment on a Black Panther newspaper, in which a report concerning threats on the life of the President had been circulated, where the Grand Jury was investigating possible violations of 18 U.S.C. §§871 (threats against the President), and 1751 (presidential assassination). The Court held:

When the collision [between governmental activity and first amendment rights] occurs in the context of a Grand Jury investigation, the government's burden is not met unless it establishes that the government's interest in the subject matter of the investigation

is "immediate, substantial and subordinating", that there is a "substantial connection" between the information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation, and that the means of obtaining the information is not more drastic than necessary to forward the asserted governmental interests. The investigation must proceed "step by step...and an adequate foundation for inquiry must be laid before proceeding in such a manner as" may inhibit First Amendment freedoms. 466 F.2d at 1083, quoting Gibson v. Florida Legislative Investigation Commission, 372 U.S. 539 (1963).

In this case, there is undisputed evidence that the Grand Jury's inquiry here has not merely chilled, but utterly frozen, the Appellants' and others' rights of free and private association and discussion; that the social clubs in question have been shut down by the investigation and by the calling of these witnesses before the Grand Jury. A heavy burden of justification must therefore be born by the Government to justify this deep intrusion into the Appellants' rights of free and private speech and association.

When first amendment interests are at stake, the government must use a scalpel, not an ax. Bursey v. United States, 466 F.2d at 1088.

Appellants submit that the Government has not met its burden of showing that the legitimacy of its interests justify this intrusion, and that no less drastic intrusion could vindicate governmental interests; that the Government has proceeded not with a scalpel but with an ax, indeed with a chain saw and bulldozer, without showing the necessity for cutting such a broad swath through the rights of free speech and associational privacy of Appellants and

their fellow social club members.

In Burse, supra, there was no question but that certain apparent threats of grave moment ("We will kill Richard Nixon") had been made in a speech by a black panther official, which speech was reported and featured in the witness's newspaper. Even under these circumstances, the Court held that the Government had insufficient justification for its broad scale intrusion. Here, by contrast, nowhere in this record is there any showing whatever by the Government that any crimes were committed on the premises of these private social clubs, where, it is uncontroverted, "politics, affairs of the day, and other matters" were discussed, and whose corporate charter clearly shows that the club's raison d'etre was precisely to further those interests protected by the First Amendment.

Government counsel, at oral argument, asserted "It is a legitimate investigation. I think the questions show it." If, however, instead of the unlucky Gettysburg Social Club and Nairy's Social Club, the Not-for-Profit corporation here were the Buffalo Chapter of the NAACP or of the B'nai B'rith, whose officers and members were subpoenaed and asked unsupported questions about illegal gambling, loan sharking, and assault occurring on the premises of that organization, and if as a result of the subpoenaing and of the questioning, those organizations had totally ceased functioning and no member dared to associate there with any other for fear of governmental displeasure, then surely this Court would not hesitate to insist that the Government justify itself by producing more

evidence than the Government has shown here--no more than the questions themselves--before allowing those members and officers to be clapped in jail for incurring the displeasure of the prosecutors. Cf. People v. Doe, 35 A.D.2d 178, 314 N.Y.S.2d 5 (4th Dept. 1970).

The Court, with its overview of the Federal Criminal Justice System in this circuit and with its experience of many cases brought by overzealous prosecutorial staffs, must ask itself whether two decades from now, history will judge the current assaults on citizens liberties, via the special grand juries, the broad utilization of "use" immunity, and such overpowering tools, to invade the precincts of privacy and discussion--all in the name of fighting "organized crime"--whether history will judge this spectacle as it now views the excesses of the McCarthy period of two decades ago. The Federal Courts are the ultimate guardians of our liberties against such excesses, and this Court must carefully scrutinize the actions of prosecutors when they proceed as here with such blunt instruments into the private lives of citizens.

CONCLUSION

For the reasons stated above, the adjudications of civil contempt should be reversed.

Respectfully submitted,

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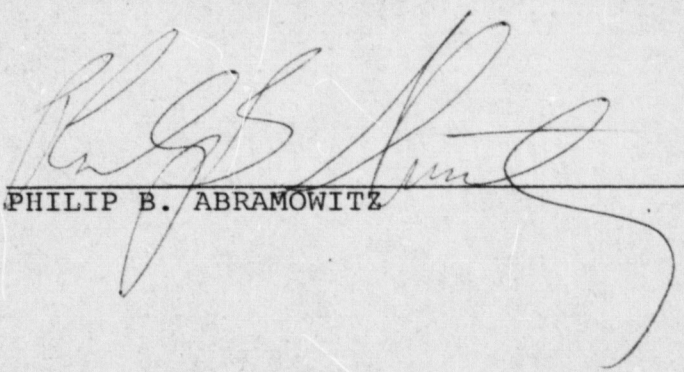
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN THE MATTER OF:

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AFFIDAVIT
OF
SERVICE

PHILIP B. ABRAMOWITZ, being duly sworn, deposes and says that
I am eighteen (18) years of age and that on March 31, 1975, I did mail
two copies of the brief and appendix in the above referenced case to
JAMES GRESENS, Attorney, Department of Justice, Genesee Building, Buffalo,
New York 14202.


PHILIP B. ABRAMOWITZ

Sworn to before
me this 31st day
of March, 1975.


LINDA L. CLEVELAND - # 4516090
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977